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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

Nos. 716, 717.

THE UNITED STATES OF AMERICA,
Appellant,

v.

CLYDE SAYLOR, J. HENDERSON BROCK, JESS BLANTON SAYLOR and ALONZO WILSON.

THE UNITED STATES OF AMERICA,
Appellant,

v.

CLARENCE POER, SIDNEY SOLOMON POPE, ODELL JAMES SHEPHERD and VERLIN FEE.

Appeals from the District Court of the United States for the Eastern District of Kentucky.

BRIEF FOR THE RESPONDENTS.

HARRY B. MILLER,
Lexington, Kentucky,
W. R. LAY,
JAMES S. GOLDEN,
Pineville, Kentucky,
Attorneys for Respondents.

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SUMMARY OF ARGUMENT.

Under Section 19 of the Criminal Code the individual's Federal rights which are guarded and protected thereunder are definitely and unmistakably personal and subject to judicial enforcement, and not political and impersonal ones. **United States v. Gradwell**, 243 U. S. 476, 61 L. ed. 861.

Under this section of the Penal Code it is not a punishable act to conspire to bribe voters. **United States v. Bathgate**, 246 U. S. 220. And in view of this Court's interpretation of this Statute in the **Bathgate** Case, it would seem that the act does not affect in any manner conspiracies to cast spurious ballots, or fictitious ballots, or conspiracies which have as their object the stuffing of ballot boxes.

There is no Federal statute which covers the act, or the conspiracy to commit the act of ballot box stuffing. According to the established policy of Congress, as interpreted by this Court in the **Bathgate** Case, the protection afforded the public from such acts is left to State laws. **United States v. Gradwell**, 243 U. S. 476, 61 L. ed. 861; **Chavez v. United States**, 261 F. 174 (8 Cir.); **United States v. Kantor**, 78 F. (2d) 710 (2 Cir.).

The contention of the appellant that the casting of a spurious ballot is identical with that of altering or failing to count a vote as cast is basically erroneous. Section 19, clearly, and devoid of any ambiguity, protects the personal rights of the individual, and there is nothing in the statute that provides a basis for the Government's argument. To hold, as is now urged by the appellant, that this statute includes the acts complained of would nullify this Court's interpretation thereof in the **Mosley**, the **Gradwell**, and the **Bathgate** decisions.

ARGUMENT.

ORIGIN, SCOPE AND APPLICATION OF SECTION 19 OF THE CRIMINAL CODE.

By a lengthy, circuitous route, counsel for appellant attempts to make section 19 of the Criminal Code applicable to the facts set out in the indictments herein. A great portion of appellant's brief is devoted to a careful analysis of the effect the casting of spurious votes would have upon the result of an election and it is stated therein: "The effects of casting spurious ballots, and of altering or failing to count ballots properly cast, are virtually identical. Each spurious ballot cast for one candidate nullified a ballot validly cast for another candidate, and diminishes the proportionate weight to which every ballot properly cast is entitled. Where spurious voting in a precinct causes the returns of that precinct to be rejected, as in Emery v. Hennessy, 331 Ill. 296, and Scholl v. Bell, 125 Ky. 740 (1907), the effect is to disfranchise, in the particular election, every voter in the precinct. Where spurious voting changes the outcome of an election, it denies to everyone concerned the right of representation by the majority's choice."

Throughout the brief for appellant there is an apparent effort to "stretch" the intent and applicability of section 19, and appellant undertakes to analyze the section in question and arrive at the conclusion that Congress intended the section in question to apply to the "stuffing" of ballot boxes.

Rather than accept the argument of counsel for appellant as to the origin and meaning of section 19, we prefer to rely upon the expressions of this Court. In the case of **United States v. Gradwell**, 243 U. S. 476, 61 L. ed. 861, the indictment in question was almost identical with the ones herein involved. Indictment 775 in the **Gradwell** case re-

lated to the conduct of a primary election held in the State of West Virginia in 1916. In the indictment twenty defendants were charged with conspiracy to defraud the United States in the matter of its governmental right to have a candidate of the true choice and preference of the Republican and Democratic parties nominated for said office and one of them elected, by causing and procuring a large number of persons who had not resided in the state a sufficient length of time to entitle them to vote under the state law, to vote at the primary for a candidate named, and also to procure four hundred of such persons to vote more than once at such primary election. Indictment 776 charged that the same defendants, named in 775, conspired to injure and oppress White, Sutherland and Rosenbloom, three candidates for the Republican nomination for United States Senator, who were voted for at the primary election held in West Virginia, under a state law of that state, by depriving them of the right and privilege of having each Republican voter vote, and vote once only, for some one of the Republican candidates for such nomination, and of not having any votes counted at such election except such as were cast by Republican voters duly qualified under the West Virginia law. It was further charged that the defendants conspired to accomplish this result by procuring a thousand persons, who were not qualified to vote under the state law, because they had not resided in that state a sufficient length of time, to vote for an opposing candidate. Demurrers filed to the indictments were sustained and the case appealed.

In discussing section 19 of the Criminal Code, this Court said:

> "Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise under this constitutional sanction in the prescribing of regulations for the conduct of elections for Representatives in Congress, or in adopting regulations

which states have prescribed for that purpose, has been settled by repeated decisions of this court. Although Congress has had this power of regulating the conduct of congressional elections from the organization of the government, our legislative history upon the subject shows that except for about twenty-four of the one hundred and twenty-eight years since the government was organized, it has been its policy to leave such regulations almost entirely to the states, whose representatives Congressmen are. For more than fifty years no congressional action whatever was taken on the subject until 1842, when a law was enacted requiring that Representatives be elected by districts (5 Stat. at L., p. 491, chap. 47), thus doing away with the practice which had prevailed in some states of electing on a single state ticket all of the members of Congress to which the state was entitled.

"Then followed twenty-four years more before further action was taken on the subject, when Congress provided for the time and mode of electing United States Senators (14 Stat. at L. 243, chap. 245) and it was not until four years later, in 1870, that for the first time, a comprehensive system for dealing with congressional elections was enacted.

"These laws provided extensive regulations for the conduct of congressional elections. They made unlawful false registration, bribery, voting without legal right, making false returns of votes cast, interfering in any manner with officers of election, and the neglect by any such officer of any duty required of him by state or Federal law; they provided for appointment by circuit judges of the United States of persons to attend at places of registration and at elections, with authority to challenge any person proposing to register or vote unlawfully, to witness the counting of votes, and to identify by their signatures the registration of voters and election tally sheets; and they made it lawful for the marshals of the United States to appoint special deputies to preserve order at such elections, with authority to arrest for any breach of the peace committed in their view.

"These laws were carried into the revision of the United States Statutes of 1873-74, under the title, 'Crimes against the Elective Franchise and Civil Rights of Citizens,' Rev. Stat. 5506 to 5532.

"It will be seen from this statement of the important features of these enactments that Congress by them committed to Federal officers a very full participation in the process of the election of Congressmen, from the registration of voters to the final certifying of the results, and that the control thus established over such elections was comprehensive and complete. It is a matter of general as of legal history that Congress, after twenty-four years of experience, returned to its former attitude towards such elections, and repealed all of these laws with the exception of a few sections not relevant here."

In discussing the attempt upon the part of the Government to make section 19 of the Criminal Code applicable to the casting of illegal ballots, the Court further said:

"Here, again, confessedly, an attempt is being made to make a new application of an old law to an old type of crime, for sec. 19 has been in force, in substance, since 1870 but has never before been resorted to as applicable to the punishment of offenses committed in the conduct of primary elections or nominating caucuses or conventions, and the question presented for decision is:

"Did the candidates named in the indictment have such a right under the applicable West Virginia law that a conspiracy to corrupt the primary election held under that law on the 6th day of June 'injured and oppressed' them within the meaning of sec. 19 of the Federal Criminal Code?

"That this sec. 19 of the Criminal Code is applicable to certain conspiracies against the elective franchise is decided by this Court in United States v. Mosley, 238 U. S. 383, 59 L. ed. 1355, 35 Sup. Ct. Rep. 904, but that decision falls far short of making the section applica-

ble to the conduct of a state nominating primary, and does not advance us far towards the claimed conclusion that illegal voting for one candidate at such a primary so violates a right secured to the other candidates by the United States Constitution and laws as to constitute an offense within the meaning and purpose of the section."

While the **Gradwell** Case decides that section 19 has no application in primaries, it goes further and arrives at the conclusion that section 19, relied on herein, was enacted for the protection of civil rights of the then late enfranchised Negro and cannot be extended to make it an agency for enforcing the State primary law such as was then in force in West Virginia.

The case of **United States v. Mosley**, 238 U. S. 383, 59 L. ed. 1355, 35 Sup. Ct. Rep. 904, referred to in the **Gradwell** Case, merely holds that section 19 of the Criminal Code was constitutional and that it guaranteed the right to the individual "to vote and to have his vote counted as cast." The **Gradwell** Case follows the case of **Newberry v. United States**, 256 U. S. 232, which, in effect, held that Congress had no right to legislate as to primaries, whereas in the **Gradwell** Case it was distinctly held that Congress had the right to legislate with reference to primaries, but it had not done so and consequently section 19 did not apply to primaries. However, the real interpretation of the **Gradwell** Case is that section 19 merely protects the "personal right" of the voter and did not extend beyond that point.

A great effort is made by counsel for appellant to distinguish the **Bathgate** Case from the one under consideration. The conclusions reached by the Government, we believe, are entirely erroneous. In the case of **United States v. Bathgate**, 246 U. S. 220, 62 L. ed. 679, six cases were involved alleging a conspiracy to injure and oppress, in violation of sec. 19 of the Criminal Code. Two counts of the indictments charged the defendants with conspiracy to

injure candidates for presidential electors, the United States Senate and representative in Congress at the regular election in Ohio in 1916, "also qualified electors" who might properly vote thereat, in the free exercise and enjoyment of certain rights and privileges secured by the Constitution and laws of the United States, viz.: the right (a) of being a candidate; (b) that only those duly qualified should vote; (c) that the results should be determined by voters who had not been bribed, and (d) that the election board should make a true and accurate count of votes legally cast by qualified electors and no others. The indictment further alleged the conspiracy was carried into effect as intended by purchasing votes of certain electors and causing election board to receive them and make inaccurate returns.

At this point we call the Court's attention to the fact that the allegations in the indictment in the **Bathgate** Case are identical with those in the cases now before this Court.

In deciding that section 19 was not applicable, the Court in the **Bathgate** case stated:

> "The government in effect maintains that lawful voters at an election for presidential electors, senator and member of Congress, and also the candidates for those places, have secured to them by Constitution or laws of the United States the right and privilege that it shall be fairly and honestly conducted; and that Congress intended by sec. 6, Act of 1870, to punish interference with such right and privilege through conspiracy to influence voters by bribery.
>
> "Section 19, Criminal Code, of course, now has the same meaning as when first enacted as sec. 6, Act of 1870, and considering the policy of Congress not to interfere with elections within a state except by clear and specific provisions, together with the rule respecting construction of criminal statutes, we cannot think it was intended to apply to conspiracies to bribe voters. Bribery, expressly denounced in another section

of the original act, is not clearly within the words used; and the reasoning relied on to extend them thereto would apply in respect of almost any act reprehensible in itself, or forbidden by state statutes, and supposed injuriously to affect freedom, honesty, or integrity of an election. This conclusion is strengthened by express repeal of the section applicable to bribery, and we think is rendered entirely clear by considering the nature of the rights or privileges fairly within intendment of original sec. 6.

"'The right or privilege to be guarded, as indicated both by the language employed and context, was a definite, personal one, capable of enforcement by a court, and not the political, nonjudiciable one common to all, that the public shall be protected against harmful acts, which is here relied on. The right to vote is personal, and we have held it is shielded by the section in question.''

As we construe the **Bathgate** Case, it decides that the act of 1894 stripped the United States of any participation in nominating primaries or in final elections other than the right to protect the Constitutional right of each voter to the end that he be permitted unoppressed to cast his vote and to have it counted as cast. This, we believe, is the extent to which section 19 is applicable, and if our interpretation of the statute in question is correct, the indictments rendered herein fall far short of making section 19 applicable to these cases.

The Government maintains that the effects of casting spurious ballots and of altering or failing to count ballots legally cast are identical. We cannot conceive how this position is tenable.

As decided in the Bathgate Case, Section 19 of the Civil Code merely protects the individual in his right to vote and have his vote counted as cast, and that the inclusion of bribed votes in the ballot box with legal votes does not constitute a Federal offense.

What is a spurious vote? The meaning is apparent. A spurious vote is an illegal one. A bribed vote is an illegal one. Both stand on the same footing. The casting of either dilutes, to the same extent, the value and effect of the legal votes. How, then, in view of the **Bathgate** Case, can it be successfully argued by the Government that bribed votes change the value and effect of the legal votes any more than the votes of fictitious persons?

How, then, can it be contended that the casting of spurious or fictitious ballots is any more a Federal offense than the voting of bribed votes?

Either both are Federal offenses or neither is, and we maintain that the decision in the **Bathgate** Case is a complete answer to the questions hereinabove propounded.

The **Bathgate** Case has been interpreted by various Circuit Courts of Appeals.

In the case of **United States v. Kantor**, 78 Fed. (2) 710, the appellants were convicted for conspiracy to injure, oppress, threaten and intimidate citizens in the exercise of their civil rights of voting. Appellant, Kantor, was the treasurer of a campaign committee with a duty to distribute money to the captains for the purpose of paying workers on election day. The government's case was predicated on the contention that the appellants interfered with voters at the machines, rang up votes on the machines, forged signatures of voters, and turned the voting machines in improper positions in the polling places.

The question presented in that case was, whether the indictment was sufficient and whether there was error in ruling at the trial. The lower court charged that conviction might be had if the jury found injury to voters who were entitled to vote for a representative at large in Congress and for a representative in Congress and for a United States Senator. The evidence at the trial showed forged signatures and that votes were rung up without the formality of signing the poll book. Over the appellant's

exception, the court below charged that legal voters were injured, saying:

> "If by reason of the fact that people who are disqualified are permitted to vote, from the machinations and arrangements of persons who may be in control of the election at this particular place, then my one vote does not count, as it should in the general result, the person so injured is within the protection of this statute, and if people conspire to injure a person in that way, they come within the prohibitions of the statute."

After deliberation, the jury returned for further instructions, and the court charged that:

> "If some of these people who are said not to have had the right to vote did vote here, or if someone improperly rung up votes, that that may be considered an injury to a person who had a right to vote and to have his vote counted, and to that extent that votes were unlawfully cast, why there was an impairment of the right of those who were legally qualified and who had cast their votes, and thereby they may be said to be injured, because they were not getting the full value of their votes."

Exceptions were taken to the instructions, and the Circuit Court of Appeals, in deciding the charge erroneous, following the language of the **Bathgate** Case, said:

> "It is the individual voter who is protected. It is not every wrongful act, which alters the result of the election, which is punishable under the section of the statute. It must be some act intended to prevent some citizen from exercising his constitutional rights."

The Court further concluded that there was no injury to qualified voters by the inclusion of disqualified votes within the meaning of section 19 of the Criminal Code.

In determining that the judgment should be reversed, and that the instructions were erroneous, the Court, further quoting from the **Bathgate** Case, stated: "Illegal and disqualified voting was held no longer to be a federal offense."

Thus, it may be seen that the facts in the **Kantor** Case are identical with the facts in the case at bar, and the Circuit Court of Appeals, in following the decisions of the Supreme Court, unqualifiedly decided that the permitting of disqualified persons to vote, or the inclusion of improper votes for one candidate, is not a federal offense.

This is the same contention we make in this case. The position which we earnestly maintain is that there must be some violation of the personal right to the individual voter who presents himself at the polls. That, in order to come within the protection of section 19, there must either be a denial to him of his right to vote or there must be a failure to count his vote after it has been cast. There is no such allegation in the indictment in these cases, and the Government herein is merely proceeding under the theory that a "dilution" of the value of legal votes cast constitutes a federal offense.

We further call the Court's attention to the case of **Chavez v. United States**, 261 Fed. 174, wherein Chavez, among others, was convicted and sentenced for violating section 19 of the Criminal Code, which makes it a crime to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. The indictment therein charged that the defendants, who were the judges and clerks in a certain precinct in an election at which certain persons named were candidates for presidential electors, United States Senator and Representative in Congress, conspired to injure and oppress certain citizens of the United States in the free exercise and enjoyment of certain federal rights

and privileges, that is to say, the rights and privileges appertaining to the said several candidates, and to all the legally qualified voters at said election voting in said state of New Mexico. The indictment then states that "the right mentioned is of having all legal votes cast properly received, counted, and returned, of having only such votes cast, counted, and returned, and of having the election determined accordingly." Finally, there is a specification of the means and methods whereby defendants were to accomplish the object of the conspiracy.

In reversing the sentences, the Eighth Circuit Court of Appeals, following the language of the **Bathgate** Case, held that the federal rights or privileges protected by section 19 of the Criminal Code is a personal right, such as that of the individual voter to vote and to have his vote counted as cast, and not the general interest of the candidates, or of the electors or the public at large, in the proper conduct of the election.

In that case the Court said:

> "It needs but a glance at the language of the indictment above quoted to show that it proceeds upon a broad conception of the statute held in the **Bathgate** Case to be erroneous. The conspiracy charged is, in apt and express words, against the right of the candidates and the voters in the state at large—the right of the former as standing for office and of the latter not distinguishable from the general public interest."

The decision of the learned Judge in the **Chavez** Case follows our conception of the meaning, the scope and the applicability of section 19 of the Criminal Code, and that the intent of the statute is solely to give the right to a citizen to vote and have his vote counted as cast, and that there is no protection to any voter as to the final outcome of the election. In short, we maintain there must be some offense against the individual in his right to exercise his

constitutional privilege of voting and having his vote counted as cast.

This, we think, to be the true interpretation of the statute, because section 19 must be construed in the light of our national policy as emphasized by the repeal of the Enforcement Act, which repeal evidenced a return of election control to the states.

This Court has held that section 19 is limited and narrow, and has no general application to elections, as such, and is purely a statute punishing conspiracy to injure a citizen, not generally, but only in those cases where the contemplated injury is motivated by the existence of an individual federal right. Our position is further strengthened by the fact that under section 19 conspiracies must be personal in their essence. We call the Court's attention to the association of words in section 19: "Injure," "oppress," "threaten," "intimidate," "citizen," "his," "him." Each word is personal, not collective. Each word points toward the individual, and conspiracies under section 19 should correspond with the manifest spirit of the statute.

The learned District Judge in these cases rendered a memorandum opinion (R. 8, 9, 10). In that opinion he carefully analyzes the indictments, and in holding that the mere dilution of the value of one voter's vote by the inclusion in the ballot box of spurious votes is not a Federal offense, he states:

> "The question presented for decision was whether the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted, is a Constitutional right to which Congress intended to afford protection by the provisions of section 19 of the Criminal Code of the United States.

"That the right of qualified citizens to vote in a Congressional election and to have their votes counted as cast are rights 'secured by the Constitution' within the meaning of and protected by section 19 of the Criminal Code, is not open to question. Ex parte Yarbrough, 110 U. S. 651; United States v. Mosely, 238 U. S. 383. Where a primary election is an integral part of the procedure for choosing a representative in Congress, the same rights of voters are protected by the same statute (United States v. Classic, 313 U. S. 299).

"But these cases seem to fall far short of making the Federal Statute applicable to the character of conduct charged in this indictment.

"In United States v. Bathgate, 246 U. S. 220, in holding the Federal Statute not applicable to a conspiracy to bribe voters at a general Congressional election, the Court pointed out that by the Act of February 8, 1894, 28 Stat. 36, repealing various provisions of the Act of 1870, which prescribed a comprehensive system to secure freedom and integrity of elections, Congress evidenced its policy 'to leave the conduct of elections at which its members are chosen to state law alone, except where it may have expressed a clear purpose to establish some further or definite regulation' and that, in the light of this policy, section 19 of the Federal Criminal Code was not intended to apply to or protect the general public from all reprehensible acts tending to injuriously affect the freedom, honesty and integrity of Congressional elections, but 'the right or privilege to be guarded, as indicated both by the language employed and context, was a definite, personal one, capable of enforcement by a court, and not the political, nonjudicable one common to all that the public shall be protected against harmful acts, * * *.'

"The strict construction and limited application thus placed upon the statute is controlling here and requires that the demurrer to the indictment be sustained upon the ground that section 19 of the Criminal

Code of the United States, as so construed, does not apply to or embrace a conspiracy to commit the acts charged in the indictment. There is no Federal statute which covers the reprehensible election fraud commonly referred to as 'ballot-box stuffing.' According to the established policy of Congress, as interpreted by the Supreme Court in the Bathgate case, the protection of the public from such type of election crimes is left to State laws (United States v. Gradwell, 253 U. S. 476; Chavez v. United States, 261 F. 174 (8 Cir.); United States v. Kantor, 78 F. (2d) 810 (2 Cir.); Steedle v. United States, 85 F. (2d) 867 (3 Cir.)."

Counsel for appellant undertakes to make applicable to this case the decision of this Court in the case of **United States v. Classic**, 313 U. S. 299. An examination of that case will clearly demonstrate that there is no similarity between the cases. The **Classic** Case, in effect, reverses the decisions in the **Gradwell** and **Newberry** Cases, and decides that, since a primary in the State of Louisiana is an integral part of the election, Section 19 of the Criminal Code affords the same protection to the individual voter in a primary election as it does in final elections. In addition to that, the overt act charged in the **Classic** Case was that the appellees altered eighty-three ballots cast for one candidate and fourteen cast for another, marking and counting them as votes for a third candidate, and that they falsely certified the number of votes cast for the respective candidates to the chairman of the Second Congressional District Committee. We readily concede that, since there was an alteration of eighty-three votes, that eighty-three persons were deprived of their constitutional rights to vote and have their votes counted as cast, but such is not the case before the Court at this time. As the Court said in the **Classic** Case:

"But we are now concerned with the question whether the right to choose at a primary election, a

candidate for election as representative, is embraced in the right to choose representatives secured by Article 1, Sec. 2."

Since eighty-three legal voters had their ballots changed to votes for the opposite candidate, this Court said:

> "The injury suffered by the citizens in the exercise of their right is an injury which the statute described and to which it applies in the one case as in the other."

In the dissenting opinion of Mr. Justice Douglas, in which Mr. Justice Black and Mr. Justice Murphy joined, it is stated:

> "Civil liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference. Section 19 does not purport to be an exercise of Congress of its power to regulate primaries. It merely penalizes conspiracies 'to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.'"

What is that privilege secured to the individual citizen by the Constitution of the United States? It is the privilege of suffrage. It is the privilege of voting unoppressed, and having his vote counted as cast.

Mr. Justice Douglas in his dissenting opinion, further states:

> "While they protect the right to vote and the right to have one's vote counted at the final election as held in the Yarbrough and Mosley Cases, they certainly do not per se extend to all acts which in their indirect or incidental effect restrain, restrict, or interfere with that choice. Bribery of voters at a general elec-

> tion certainly is an interference with that freedom of choice. It is a corruptive influence which for its impact on the election process is as intimate and direct as the acts charged in this indictment. And Congress has ample power to deal with it. But this Court in United States v. Bathgate, 246 U. S. 220, 62 L. ed. 676, 38 S. Ct. 269, by a unanimous vote, held that conspiracies to bribe voters at a general election were not covered by Sec. 19."

This statement in the dissenting opinion is in direct accord with our contention in this case, that, while the statute protects the right of the citizen to vote and have his vote counted as cast, section 19 does not in itself per se extend to all acts which have an effect upon the final outcome of the election. This portion of the dissenting opinion directly contradicts the contention of the Government wherein it alleges that spurious votes are in the same class as votes which are not counted when legally cast. This contention upon the part of the Government is an effort to extend the statute far beyond its intended meaning.

Mr. Justice Douglas in his dissenting opinion further states:

> "In terms of casual effect tampering with the primary vote may be as important on the outcome of the general election as bribery of voters at the general election itself. Certainly from the viewpoint of the individual voter there is as much a dilution of his vote in the one case as in the other. So, in the light of the Mosley and Bathgate Cases, the test under Sec. 19 is not whether the acts in question constitute an interference with the effective choice of the voters. It is whether the voters are deprived of their votes in the general election. Such a test comports with the standards for construction of a criminal law, since it restricts Sec. 19 to protection of the rights plainly and directly guaranteed by the Constitution."

In addition to this, the dissenting opinion further states:

> "The Mosley Case, in my view, went to the verge when it held that Sec. 19 and the relevant constitutional provisions made it a crime to fail to count votes cast at a general election."

We believe that the **Classic** Case not only does not sustain the contention of appellant in these cases, but directly opposes it. In the **Classic** Case the decision made section 19 applicable to primaries as well as general elections, but, in addition to that, there was an entirely different feature involved, to wit: Eighty-three ballots cast by legal voters were changed and the votes counted for other candidates, and thus eighty-three persons had their constitutional right of voting and having their votes counted as cast violated. The **Classic** Case is not in any way applicable to this particular case, where there is no allegation in the indictments before the Court that any voter was denied the privilege of voting or that any voter failed to have his vote counted as cast.

In its final analysis, this case is submitted to the Court on the question of whether or not a legal voter has suffered any constitutional right of having the value of his vote diluted by the inclusion of his ballot in the ballot box with the ballots of illegal voters. The **Bathgate** Case, which was a unanimous opinion of this Court, states it is not an offense to include illegal votes with legal votes, and, since a bribed vote is just as illegal and just as spurious as a ballot placed in the box without a voter being present, the ruling in the **Bathgate** Case is controlling here and under the indictments there is no Federal offense charged.

CONCLUSION.

Based upon the allegations contained in the indictments herein and the law submitted, we maintain that the lower court properly sustained the demurrers. This conclusion is based upon the fact that nowhere in the indictments may be found any allegation that any voter was deprived of his right to vote and to have his vote counted as cast, and the only theory upon which the Government is proceeding is that a Federal offense is committed if the value and effect of one vote is diluted by commingling that ballot with an illegal one.

We respectfully submit that the orders of the Court below, sustaining the demurrers to the indictments, should be affirmed.

HARRY B. MILLER,
Lexington, Kentucky,
W. R. LAY,
JAMES S. GOLDEN,
Pineville, Kentucky,
Attorneys for Respondents.

P. 1.

SUPREME COURT OF THE UNITED STATES.

Nos. 716-717.—October Term, 1943.

The United States of America, Appellant, vs. Clyde Saylor, et al.		Appeals from the District Court of the United States for the Eastern District of Kentucky.
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[May 22, 1944.]

Mr. Justice Roberts delivered the opinion of the Court.

These cases come here under the Criminal Appeals Act. The District Court sustained demurrers to indictments for conspiracies forbidden by § 19 of the Criminal Code.[1] The section provides: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, . . . they shall be punished.

As the cases present identical questions it will suffice to state No. 716. The indictment charged that a general election was held November 3, 1942, in Harlan County, Kentucky, for the purpose of electing a Senator of the United States, at which election the defendants served as the duly qualified officers of election; that they conspired to injure and oppress divers citizens of the United States who were legally entitled to vote at the polling places where the defendants officiated, in the free exercise and enjoyment of the rights and privileges guaranteed to the citizens by the Constitution and laws of the United States, namely, the right and privilege to express by their votes their choice of a candidate for Senator and their right to have their expressions of choice given full value and effect by not having their votes impaired, lessened, diminished, diluted and destroyed by fictitious ballots fraudulently cast and counted, recorded, returned, and certified. The indictment charged that the defendants, pursuant to their plan,

[1] 18 U. S. C. § 51.

tore from the official ballot book and stub book furnished them, blank unvoted ballots and marked, forged, and voted the same for the candidate of a given party, opposing the candidate for whom the injured voters had voted, in order to deprive the latter of their rights to have their votes cast, counted, certified and recorded and given full value and effect; that the defendants inserted the false ballots they had so prepared into the ballot box, counted and returned them, together with the other ballots lawfully cast, so as to create a false and fictitious return respecting the votes lawfully cast.

The appellees demurred to the indictment, as failing to state facts sufficient to constitute a crime against the United States. The demurrer attacked the indictment on other grounds raising questions which, if decided, would not be reviewable here under the Criminal Appeals Act. The District Court decided only that the indictment charged no offense against the laws of the United States. This ruling presents the question for decision.

The appellees do not deny the power of Congress to punish the conspiracy described in the indictment. In the light of our decisions, they could not well advance such a contention.[2] The inquiry is whether the provision of § 19 embraces a conspiracy by election officers to stuff a ballot box in an election at which a member of the Congress of the United States is to be elected.

In *United States* v. *Mosley*, 238 U. S. 383, this court reversed a judgment sustaining a demurrer to an indictment which charged a conspiracy of election officers to render false returns by disregarding certain precinct returns and thus falsifying the count of the vote cast. After stating that § 19 is constitutional and validly extends "some protection at least to the right to vote for Members of Congress," the court added: "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box." The court then traced the history of § 19 from its origin as one section of the Enforcement Act of May 31, 1870,[3] which contained other sections more specifically aimed at election frauds, and the survival of § 19 as a statute of the United States notwithstanding the repeal of those other sections. The conclusion

[2] Ex parte Yarbrough, 110 U. S. 651, 657, 658, 661, 663; United States v. Classic, 313 U. S. 299, 314, 315.

[3] c. 114, 16 Stat. 140, as amended by c. 99, 16 Stat. 433.

was that § 19 protected personal rights of a citizen including the right to cast his ballot, and held that to refuse to count and return the vote as cast was as much an infringement of that personal right as to exclude the voter from the polling place. The case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted.

The decision was not reached without a strong dissent, which emphasized the probability that Congress did not intend to cover by § 6 of the Act (now § 19) the right to cast a ballot and to have it counted, but to deal with those rights in other sections of the act. And it was thought this view was strengthened by the repeal, February 8, 1894,[4] of the sections which dealt with bribery and other election frauds, including § 4, which, to some extent, overlapped § 6, if the latter were construed to comprehend the right to cast a ballot and to have it counted. Notwithstanding that dissent, the *Mosley* case has stood as authority to the present time.[5]

The court below thought the present cases controlled by *United States* v. *Bathgate*, 246 U. S. 220. That case involved an indictment charging persons with conspiring to deprive a candidate for office of rights secured to him by the Constitution and laws of the United States, in violation of § 19, and to deprive other voters of their rights, by the bribery of voters who participated in an election at which members of Congress were candidates. This court affirmed a decision of the district court sustaining a demurrer to the indictment, and distinguished the *Mosley* case on several grounds: first, that, in the Enforcement Act, bribery of voters had been specifically made a criminal offense but the section so providing had been repealed; secondly, that the ground on which the *Mosley* case went was that the conspiracy there was directed at the personal right of the elector to cast his own vote and to have it honestly counted, a right not involved in the *Bathgate* case.

If the voters' rights protected by § 19 are those defined by the *Mosley* case, the frustration charged to have been intended by the defendants in the present cases violates them. For election officers knowingly to prepare false ballots, place them in the box, and count them, is certainly not honestly to count the votes lawfully cast. The mathematical result may not be the

[4] c. 25, 28 Stat. 36.

[5] United States v. Gradwell, 243 U. S. 476; In re Roberts, 244 U. S. 650; Hague v. C. I. O., 307 U. S. 496, 527; United States v. Classic, *supra*, 321.

same as would ensue throwing out or refusing to count votes lawfully cast. But the action pursuant to the conspiracy here charged constitutes the rendering of a return which, to some extent, falsifies the count of votes legally cast. We are unable to distinguish a conspiracy so to act from that which was held a violation of § 19 in the *Mosley* case.

It is urged that any attempted distinction between the conduct described in the *Bathgate* case and that referred to in the *Mosley* case is illogical and insubstantial; that bribery of voters as badly distorts the result of an election and as effectively denies a free and fair choice by the voters as does ballot box stuffing or refusal to count or return the ballots. Much is to be said for this view. The legislative history does not clearly disclose the Congressional purpose in the repeal of the other sections of the Enforcement Act, while leaving § 6 (now § 19) in force. Section 19 can hardly have been inadvertently left on the statute books. Perhaps Congress thought it had an application other than that given it by this court in the *Mosley* case. On the other hand, Congress may have intended the result this court reached in the *Mosley* decision. We think it unprofitable to speculate upon the matter for Congress has not spoken since the decisions in question were announced, and the distinction taken by those decisions has stood for over a quarter of a century. Observance of that distinction places the instant case within the ruling in the *Mosley* case and outside that in the *Bathgate* case.

Our conclusion is contrary to that of the court below and requires that the judgments be reversed.

So ordered.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK and Mr. Justice REED concur, dissenting.

The question is not whether stuffing of the ballot box should be punished. Kentucky has made that reprehensible practice a crime. See Ky. Rev. Stat. 1942, § 124.220; *Commonwealth* v. *Anderson*, 151 Ky. 537; *Tackett* v. *Commonwealth*, 285 Ky. 83. Cf. Ky. Rev. Stat. 1942, § 124.180(8). And it is a crime under Kentucky law whether it occurs in an election for state officials or for United States Senator. *Id.*, § 124.280(2). The question here is whether the general language of § 19 of the Criminal Code

should be construed to superimpose a federal crime on this state crime.

Under § 19 of the Enforcement Act of May 31, 1870 (16 Stat. 144) the stuffing of this ballot box would have been a federal offense.[1] That provision was a part of the comprehensive "reconstruction" legislation passed after the Civil War. It was repealed by the Act of February 8, 1894, 28 Stat. 36—an Act which was designed to restore control of election frauds to the States. The Committee Report (H. Rep. No. 18, 53d Cong., 1st Sess., p. 7) which sponsored the repeal stated:

"Let every trace of the reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion, or force used they will be the first to feel it. Responding to a universal sentiment throughout the country for greater purity in elections many of our States have enacted laws to protect the voter and to purify the ballot. These, under the guidance of State officers, have worked efficiently, satisfactorily, and beneficently; and if these Federal statutes are repealed that sentiment will receive an impetus which, if the cause still exists, will carry such enactments in every State in the Union."

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[1] That section provided:

"That if at any election for representative or delegate in the Congress of the United States any person shall knowingly personate and vote, or attempt to vote, in the name of any other person, whether living, dead, or fictitious; or vote more than once at the same election for any candidate for the same office; or vote at a place where he may not be lawfully entitled to vote; or vote without having a lawful right to vote; or do any unlawful act to secure a right or an opportunity to vote for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or otherwise unlawfully prevent any qualified voter of any State of the United States of America, or of any Territory thereof, from freely exercising the right of suffrage, or by any such means induce any voter to refuse to exercise such right; or compel or induce by any such means, or otherwise, any officer of an election in any such State or Territory to receive a vote from a person not legally qualified or entitled to vote; or interfere in any manner with any officer of said elections in the discharge of his duties; or by any of such means, or other unlawful means, induce any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same; or knowingly and wilfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any person entitled to vote; or aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit to do any duty the omission of which is hereby made a crime, or attempt to do so, every such person shall be deemed guilty of a crime, and shall for such crime be liable to prosecution in any court of the United States of competent jurisdiction; and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or both, in the discretion of the court, and shall pay the costs of prosecution."

This Court now writes into the law what Congress struck out 50 years ago. The Court now restores federal control in a domain where Congress decided the States should have exclusive jurisdiction. I think if such an intrusion on historic states' rights is to be made, it should be done by the legislative branch of government. I cannot believe that Congress intended to preserve by the general language of § 19 the same detailed federal controls over elections which were contained in the much despised "reconstruction" legislation.

The Court, of course, does not go quite that far. It recognizes that bribery of voters is not a federal offense. *United States* v. *Bathgate*, 246 U. S. 220. But he who bribes voters and purchases their votes corrupts the electoral process and dilutes my vote as much as he who stuffs the ballot box. If one is a federal crime under § 19, I fail to see why the other is not also.

Congress has ample power to legislate in this field and to protect the election of its members from fraud and corruption. *United States* v. *Classic*, 313 U. S. 299. I would leave to Congress any extension of federal control over elections. I would restrict § 19 to those cases where a voter is deprived of his right to cast a ballot or to have his ballot counted. *United States* v. *Mosley*, 238 U. S. 383. That is the "right or privilege" the "free exercise" of which is protected by § 19. If it is said that that distinction is not a logical one, my answer is that it is nevertheless a practical one. Once we go beyond that point, logic would require us to construe § 19 so as to make federal offenses out of all frauds which corrupt the electoral process, distort the count, or dilute the honest vote. The vast interests involved in that proposal emphasize the legislative quality of an expansive construction of § 19. We should leave that expansion to Congress.

That view is supported by another consideration. The double jeopardy provision of the Fifth Amendment does not bar a federal prosecution even though a conviction based on the same acts has been obtained under state law. *Jerome* v. *United States*, 318 U. S. 101, 105, and cases cited. Therefore when it is urged that Congress has created offenses which traditionally have been left for state action and which duplicate state crimes, we should be reluctant to expand the defined federal offenses "beyond the clear requirements of the terms of the statute." *Id.* I know of no situation where that principle could be more appropriately recognized than in the field of the elections where there is comprehensive state regulation.